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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

Petitioners,

-and-

DANIEL RUBIN,

Petitioner,

v.

ELIOT SPITZER,
as Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the wake of this Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999), there has been a widening conflict within this Court's own decisions, and between the decisions of lower federal and state courts, as to whether a facial attack on the vagueness of a criminal law lies only where the provision is vague in *all conceivable applications*. (*Salerno v. United States*, 107 S. Ct. 2095 (1987)) or whether the consideration of the factors suggested in *Morales* can warrant facial review despite the potential for Constitutional application of a law in limited contexts. This case presents the conflicts between *Morales* and *Salerno* for resolution in the context of a regulation (i) invoked criminally by virtue of a boilerplate form certification asking health care providers to certify compliance with unspecified "applicable" regulations, and (ii) containing no language prohibiting any conduct by providers nor providing any definitions or standards to guide law enforcement and prevent arbitrary enforcement. In this context, the following specific questions are raised:

1. Do Federal principles of due process require that vague laws be reviewed under a more exacting facial analysis where the challenged law contains no prohibition of conduct nor any definitions and standards to guide law enforcement and prevent arbitrary ad hoc interpretations by prosecutors, judges and juries who may add their own subjective meaning to the bear terms the "rate charged to the general public".

2. Do Federal principles of due process allow a State court to preclude judicial review of the vagueness of a designated "applicable" regulation in a prosecution for an alleged false certification by laypersons of blanket compliance with unspecified "applicable" State and Federal regulations under the Medicaid program.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Ulster Home Care, Inc., states that UMC, Inc., is its sole corporate member and parent and that both entities are corporations organized under the New York Not-for-Profit Corporation Law and are tax exempt under the 26 U.S.C. § 501(c)(3) of the Internal Revenue Code.

PARTIES TO THESE PROCEEDINGS

Ulster Home Care, Inc., et al. v. Spitzer

Petitioners:	Ulster Home Care, Inc. James Mahoney, Executive Director Diane Wiegand, Associate Executive Director
Respondent:	Eliot Spitzer, as Attorney General of the State of New York

New York v. Rubin

Petitioner:	Daniel Rubin
Respondent:	People of the State of New York

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Parties to These Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	xi
Introduction	1
Opinions Below	1
Jurisdiction	1
Constitutional and Regulatory Provisions	1
Statement of the Case	2
A. Ulster's Declaratory Judgment Action.	4
B. The Rubin Prosecution.	6
Reasons for Granting the Writ	9
I. The Legal Standard For Facial Challenges In Non - First Amendment Cases Has Produced Conflicting Decisions Across The Nation And Should Be Clarified By The Supreme Court.	9

Contents

Page

A. *Morales* and *Salerno* represent conflicting lines of authority on the standard of review for "facial" challenges to criminal laws, producing conflicts among and between Federal and State Courts. 11

B. Conflicts among the State and Federal Courts. 14

C. This Joint Petition presents compelling grounds for addressing the conflicts in State and Federal Courts regarding the standard for "facial" challenges. 19

II. The Decision Below Misapplied Supreme Court Precedent To Preclude Review Of Vague Regulations. 23

III. The Court's Ruling Violates The Traditional Precedents Of This Court On The Merits Of The Vagueness Challenge. 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Arkansas v. Sullivan, __ U.S. __, 121 S. Ct. 1876 (2001) 27

Belle Maer Harbor v. Charter of Township of Harrison, 170 F.3d 553 (6th Cir. 1999) 16

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) 11

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 10

Bronston v. United States, 409 U.S. 352 (1973) ... 26

Bryson v. United States, 369 U.S. 64 (1969) 23, 24

City of Chicago v. Morales, 527 U.S. 41 (1999) ... *passim*

Colautti v. Franklin, 439 U.S. 379 (1979) 12

Connally v. General Constr. Co., 269 U.S. 385 (1926) 5, 27, 28, 29

Cramp v. Board of Public Instruction, 368 U.S. 285 (1961) 26

Forbes v. Napolitano, 236 F.3d 1009 (9th Cir. 2000) 18

Goland v. United States, 903 F.2d 1247 (9th Cir. 1900) 26

Cited Authorities

	Page
Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000)	15
Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999)	16
Holeton v. Crouse Cartage Co., 92 Ohio St. 3d 115, 748 N.E.2d 1111 (2001)	14
Janklow v. Planned Parenthood, Sioux Falls, 517 U.S. 1174 (1996)	13, 18
Kolender v. Lawson, 461 U.S. 352 (1983)	12, 18
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	11
Lerman v. Board of Elections in City of New York, 232 F.3d 135 (2d Cir. 2000)	16
Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32 (1999)	10
M. Kraus & Brothers., Inc. v. United States, 327 U.S. 614 (1946)	20
People v. Doe, 271 A.D.2d 29, 710 N.Y.S.2d 420 (NYAD 3Dept. 2000), lv. denied per Wesley, J.)	5
People v. Duz-Mor Diagnostic Laboratory, Inc., 68 Cal. App. 4th 654, 80 Cal. Rptr. 2d 419 (1999)	24, 25

Cited Authorities

Page

People v. Maness, 191 Ill. 2d 478, 247 Ill. Dec. 490, 732 N.E.2d 545 (2000) 14

People v. Nelson, 69 N.Y.2d 302, 514 N.Y.S.2d 197, 506 N.E.2d 907 (1987) 10

People v. Rubin, 271 A.D.2d 759, 706 N.Y.S.2d 225 (NY AD 3 Dept. 2000) 8, 19, 27, 29

Pharmaceutical Research and Mfrs. v. Concannon, 249 F.3d 66 (1st Cir. 2001) 17, 18

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 15

Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000) 17

Robinson v. City of Seattle, 102 Wash. App. 795, 10 P.3d 452 (2000) 14

Rodriguez v. State, 2001 WL 395399, Tex. App.-Houston [14 Dist.] (2001) 14

S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461 (9th Cir. 2001) 15, 16

Smith v. Greene County School District, 100 F. Supp. 2d 1354 (2000) 17

Staley v. Jones, 239 F.3d 769 (6th Cir. 2001) 16

Tozer v. United States, 52 F. 917 (D.C. Mo. 1892) .. 20

Cited Authorities

	Page
United States v. Frandsen, 212 F.3d 1231 (11th Cir. 2000)	17
United States v. Kafka, 222 F.3d 1129 (9th Cir. 2000)	16
United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991)	26
United States v. Mandujano, 425 U.S. 564 (1976)	23
United States v. Raines, 362 U.S. 17 (1960)	10
United States v. Ryan, 828 F.2d 1010 (3d Cir. 1987)	26
United States v. Salerno, 481 U.S. 739 (1987)	*passim*
United States v. Wurzbach, 280 U.S. 396 (1930)	10
United States of America v. Bruno's, Inc., et al., 54 F. Supp. 2d 1252 (M.D. Ala. 1999)	25
Upton v. Securities and Exchange Commission, 75 F.3d 92 (2d Cir 1996)	29
West v. Derby Unified School District, 206 F.3d 1358 (2000)	17
Winters v. New York, 333 U.S. 507 (1948)	12

Cited Authorities

Page

United States Constitution:

First Amendment 13, 15, 19, 23

Fourteenth Amendment 1, 24

Statutes and Regulations:

10 NYCRR Part 86 25

10 NYCRR Part 405 25

10 NYCRR Part 415 25

18 NYCRR § 505.14 25

18 NYCRR 505.14(h)(7)(ii)(a) 2

18 NYCRR § 505.14(h)(7)(ii)(a)(1) 7

18 NYCRR Part 505 25

26 U.S.C. § 501(c)(3) ii

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1396, *et seq.* 2

42 U.S.C. § 1396a(a)(30) 2

Penal Law § 155.40 7

Penal Law § 175.35 7

Cited Authorities

Page

Other Authorities:

Origin of the Rule of Law, Friedrich A. Hayek, *The Constitution of Liberty*, University of Chicago Press, 1960 24

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000) 17

Michael C. Steel, *Constitutional Law – The Vagueness Doctrine: Two Part Test, or Two Conflicting Tests?*, 35 Land & Water L. Rev. 255 (2000) 17

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeals Of The State Of New York Dated And Decided May 10, 2001 ..... 1a

Appendix B — Opinion Of The Court Of Appeals Of The State Of New York In *People v. Rubin* Dated And Decided May 10, 2001 ..... 6a

Appendix C — Opinion And Order Of The Supreme Court Of The State Of New York, Appellate Division, Third Department Dated, Decided And Entered April 13, 2000 ..... 11a

Appendix D — Memorandum And Order Of The Supreme Court Of The State Of New York, Appellate Division, Third Department In *People v. Rubin* Dated, Decided And Entered April 13, 2000 ..... 23a

Appendix E — Decision And Order Of The Supreme Court Of The State Of New York, County Of Ulster Dated June 21, 1999 ..... 26a

Appendix F — Opinion And Order Of The Supreme Court Of The State Of New York, Appellate Division, Third Department Dated, Decided And Entered April 22, 1999 ..... 28a

Appendix G — Decision And Order Of The Supreme Court Of The State Of New York, Appellate Division, Third Judicial Department On Motion Dated, Decided And Entered September 9, 1998 ..... 38a

Appendices

Page

Appendix H — Decision And Order Of The Supreme Court Of The State Of New York, County Of Ulster Dated July 9, 1998 ..... 40a

Appendix I — Decision And Order Of The Supreme Court Of The State Of New York, County Of Ulster Dated June 2, 1998 ..... 42a

INTRODUCTION

This is a joint petition respectfully requesting that a writ of certiorari issue to review two related decisions of the New York State Court of Appeals dated May 10, 2001 reversing unanimous intermediate appellate court rulings which invalidated the criminal enforcement of a Medicaid regulation on its face as violating the Fourteenth Amendment's proscription against vague and standardless laws. Petitioner Ulster Home Care, Inc., (hereinafter "Ulster") commenced a declaratory judgment action against the enforcement of what has come to be known as the "public charge" regulation. Ulster obtained a preliminary injunction against any prosecution based thereon and subsequently obtained full declaratory relief. Petitioner Denial Rubin (President of a proprietary home care agency) was prosecuted for certifying compliance with all applicable regulations when in fact, the Attorney General alleged that he violated the "public charge" regulation by charging "private" pay individuals less than what was paid by the Medicaid program.

OPINIONS BELOW

The opinions of the Court of Appeals rejecting a facial attack on the use of the "public charge" regulation are reproduced in the appendix hereto, at 1a, *infra*. The decisions of the Appellate Division invalidating the "public charge" regulation on its face are reproduced in the appendix hereto at 12a and 24a.

JURISDICTION

The decisions of the Court of Appeals were rendered on May 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS

The Constitutional provision applicable herein is Section 1 of the Fourteenth Amendment to the United States Constitution providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law".

The regulation at issue states as follows:

> Medical assistance payments to personal care services providers for any rate year beginning on or after January 1, 1994, are made at the lower of the following rates:
>
> (i) the rate the provider *charges the general public* for personal care services; or
>
> (ii) the rate determined by the department. . . .

18 NYCRR 505.14(h)(7)(ii)(a).

The portion of the regulation described in sub-clause (a) item (i) has been called the "public charge" regulation throughout this litigation. No definitions are included as to the "public charge" language in sub-paragraph (i) above. The portion described in item (ii) has been called the "cost-based" rate and is extensively defined in the remaining regulatory text not quoted above.

STATEMENT OF THE CASE

As part of a 1997 State-wide investigation of the home care industry in New York, the Attorney General focused on a payment regulation which had been promulgated effective January 1, 1994 now known as the public charge regulation. This regulation provided that Medicaid reimbursements be at the "lower of" a provider's cost based rate or "the rate the provider charges the general public".[1] Although home care providers had been instructed to submit claims using cost-based

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1. Personal care services in New York's Medicaid program is authorized under Title XIX of the Social Security Act (*42 U.S.C. § 1396, et seq.*), popularly referred to as the Medicaid Act. Payment for Medicaid services has been governed by a general mandate contained within the Federal Medicaid Act at 42 U.S.C. § 1396a(a)(30) to assure that payments to providers of care are related to efficiency, economy and quality of care such that care will be available at least to the extent that such care is available to the general population.

rates, *no* definitions or standards were adopted either in regulation or in writing on the meaning of the terms "charges" or "general public". The regulation is passive and, on its face, did not affirmatively require that providers do anything. Instead, providers were instructed as to what rate to bill on Medicaid claims via a Medicaid Provider Manual which advised only the "rate code" set by the Medicaid agency was to be included on all such claims. No mention was included as to any other charge, whether public or private.

Ulster[2] discovered that the Attorney General was about to enforce the "public charge" concept through criminal and civil fraud actions after the Attorney General's specialized "Medicaid Fraud Control Unit" reviewed Ulster's books and records. The Attorney General determined that the rate Ulster "charged" to the "general public" was lower than the Medicaid cost based rate which Ulster had received for the period from 1994 through 1997. Significantly, in order to arrive at a lower rate, the Attorney General's staff unilaterally defined the term "general public" to mean less than 7% of Ulster's patients who were uninsured and paid for their own care at discounted amounts. He also defined "charges" to be what his audit staff saw as a standard discounted amount paid "most often" by such uninsured patients. Separate amounts billed by Ulster for holidays, transportation and supplies were not considered in the Attorney General's calculation, nor were any other amounts paid by other members of the public served by Ulster.

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2. Ulster Home Care is a non-profit, charitable corporation which has been providing services to the community it serves since 1969. Ulster currently serves the needs of approximately 47% of Ulster County's Medicaid charges who require personal care services. Ulster serves a diverse public which includes individuals who qualify for Medicaid subsidies, individuals who are under the child or adult protective services jurisdiction of the County, individuals who have insurance to pay for their care, as well as those who have no subsidies their care or are uninsured and must pay from their own pocket.

Despite the regulation's passive language, the Attorney General concluded that Ulster had violated the "public charge" regulation by billing Medicaid at the agency determined "cost based" rate when its "charges" to the "general public" were less. The Attorney General used certifications which appear on the reverse side of all claims submitted to Medicaid as the primary vehicle of enforcement by alleging that Ulster's statement of compliance was false. These certifications state that the provider has "furnished or caused to be furnished the care, services and supplies itemized and done so **in accordance with applicable federal and state laws and regulations**." The Attorney General also asserted that Ulster failed to include the discounted amounts actually paid by the uninsured category of patients on a questionnaire which asked for Ulster's schedule of fees charged to the "general public". Although he initially calculated a repayment of over $1.25 million, the Attorney General demanded payment of over $600,000 from Ulster as part of this review.

Ulster advised the Attorney General that the regulation was never implemented by the administrative Medicaid agency and that its Medicaid contract *exclusively* provided that Ulster was to be paid at the cost-based rate determined by the State with no retroactive changes. However, the Attorney General's response was to serve some 10 Grand Jury subpoena's around the Kingston community on former Board members and employees. Ulster quickly offered to pay $136,000 as all it could afford to try to settle the matter. This offer was rejected as insufficient.

A. Ulster's Declaratory Judgment Action.

Ulster commenced the underlying declaratory judgment action on May 20, 1998, and obtained a preliminary injunction on June 9, 1998 preventing the Attorney General from prosecution based on any retroactive interpretation of the "public charge" regulation as well as the existence of a contract which prohibited retroactive changes to rate. The Attorney General

was then held in contempt for procuring an indictment of Ulster and its executive staff on June 23, 1998.[3]

After the preliminary injunction was affirmed, Ulster renewed its motion for summary judgment before the trial court on the basis that *City of Chicago v. Morales* 527 U.S. 41 (1999) provided a means of facially reviewing the regulation at issue. The trial court denied summary judgment. Ulster appealed the ruling and a five member panel of the Appellate Division held that the regulation was unconstitutionally void on its face under Federal Supreme Court standards:

> In the absence of any guidance, we find that providers of personal care services were in fact "left to guess" . . . the meaning of the public charge portion of the regulation and the effect it may have on them by submitting bills to Medicaid at a DSS approved cost-based rate. "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature"

Connally v. General Constr. Co., 269 U.S. 385, 394, *supra.* (22a).

The Appellate Division found that the Legislature authorized a cost related payment system and the agency promulgating the regulations was "silent as to its construction of the public charge portion of the regulation". (*Id.*) Therefore, the Attorney General's interpretation "would be as likely to defeat the purpose of the Legislature [and DSS] as to promote

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3. Both the civil court judge and the criminal court judge prevented the Attorney General from going forward with the arraignment. The preliminary injunction and contempt findings were then affirmed by the Appellate Division on April 13, 1999. The Attorney General's criminal proceeding — initiated in contempt of court — was dismissed with leave to appeal denied by the Court of Appeals. (*See People v. Doe*, 271 A.D.2d 29, 710 N.Y.S.2d 420 (NYAD 3Dept. 2000), lv. denied per Wesley, J.)

it". (App. at 21a). Citing to this Court's decision in *City of Chicago v. Morales*, *supra*, The Appellate Division concluded that "in the specific context of the personal care services industry, we are constrained to find that the rate charged to the 'general public', in the absence of guidance or definition, is standardless". (22a).

While the Appellate Division analyzed every aspect of the application of the "public charge" regulation, including the fact that Department staff in the agency which promulgated it affirmatively stated that there were no definitions of the terms and "no guidance" could be provided, a five member panel of the Court of Appeals reversed the Appellate Division's facial invalidation of the "public charge" regulation. Significantly, the Court of Appeals provided no analysis whatsoever on why the regulation could be constitutionally applied by prosecutors, judges and juries when there was an utter lack of any definitions or standards. The Court simply held that the regulation could be understood by ordinary people because its terms were found in other unrelated laws. Nor did the high court provide any basis as to how a passive regulation could ever be the basis for any affirmative criminal conduct. The Court of Appeals refused to apply or distinguish any of the key Supreme Court decisions which apply to the facts herein.

B. The Rubin Prosecution.

Mr. Rubin was the founder and principal of Allstate Home Care, Inc. ("Allstate"), a Dutchess County, New York home care services agency, which, among other things, provided services to Medicaid patients, to uninsured patients just above the Medicaid threshold, and to patients covered by other government and insurance programs. Whereas Ulster pre-empted a criminal prosecution by obtaining an injunction, the Rubin case went through the criminal trial process.

Rubin was prosecuted, convicted and sentenced principally to 4 and 2/3 to 14 years in prison, a $50,000 fine

and $620,237.20 in restitution. The Counts at issue here are Count One of the indictment charging second degree grand larceny on a theory of larceny by false pretenses, Penal Law § 155.40, and Counts Two through Seven charging first degree filing of a false instrument, Penal Law § 175.35, and Count Eight, charging § 175.35 as to a cost report submission. With respect to Counts One through Seven that were reversed below, Mr. Rubin was prosecuted for submitting Medicaid certifications containing allegedly-false, boilerplate statements that the signatory had "furnished or caused to be furnished the care, services and supplies itemized and done so *in accordance with applicable federal and state laws and regulations*." The prosecution contended that the certifications were false because Mr. Rubin "violated" the "public charge regulation," a sub-sub provision of a lengthy regulation which states passively, and without expressly prohibiting any conduct by the public, that the State pays for Medicaid services by home health care providers at the "lower" of the provider's designated Medicaid rate or the provider's "rate charged to the general public" 18 NYCRR § 505.14(h)(7)(ii)(a)(1). Count Eight was predicated on Mr. Rubin's answer as part of a questionnaire submitted to the Medicaid agency as part of his cost report requesting his fee schedule. During the trial, agency administrators admitted that this fee schedule was never used in setting anyone's "Medicaid" rate.

As had been alleged in the Ulster case, testimony in Rubin's trial revealed that the public charge regulation had not been implemented by the administrative agency that set Medicaid payments. Testimony also revealed that one government witness (the Director of the Medicaid policy unit dealing with payments) did not know of the "public charge" regulation and another (charged with setting the "cost-based" rate) did not know of any definitions for the terms involved in the "public charge" regulation. In the words of the

individual who supervised the personal care rate setting office for the State Medicaid agency:

A **There is no definition of general public.**

Q And in fact, did you ever see any kind of literature from the department as to the definition of what would constitute the general public?

A **No.** (*People v. Rubin* Record, 337-339.)

Testimony and documentation also revealed that the Medicaid agency charged with enforcing home care regulations expressly refused to apply the "public charge" portion of the regulation in setting payment rates for the period from January 1, 1994 through January 1, 2000. The Medicaid agency is separate and apart from the Attorney General's office and is run by the Governor of the State through the State Department of Health. This agency began to implement the public charge concept effective January 1, 2000, presumedly due to the Attorney General's State wide investigation.

The Appellate Division reversed Mr. Rubin's conviction as to Counts One through Seven based on a strict legal analysis of the threshold issue of the regulation's clarity and lack of standards. It found that the holding in *Ulster* invalidating the regulation precluded any prosecutions thereon. The Court of Appeals' reversal in *Ulster* led to the reversal in *Rubin*. The Court of Appeals held that the "public charge" regulation was not unconstitutionally vague as to him. No analysis was provided as to how the blanket certifications of compliance with a passive regulation could support Mr. Rubin's conviction "as applied" under such circumstances. Similarly, the Court failed to address the fact that for an entire year charged under the indictment, the certifications did not even include the words which the prosecutor represented as being included therein. The form certifications were not revised to include such boilerplate compliance language until approximately a year after the initial time frames referenced in the indictments.

For the following reasons, Petitioners respectfully request that the Supreme Court grant Certiorari in this case and vacate these decisions of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE LEGAL STANDARD FOR FACIAL CHALLENGES IN NON-FIRST AMENDMENT CASES HAS PRODUCED CONFLICTING DECISIONS ACROSS THE NATION AND SHOULD BE CLARIFIED BY THE SUPREME COURT.

In rejecting Petitioners' facial challenge, the Court of Appeals in New York followed a line of cases precluding such challenges outside of the First Amendment context. Such a ruling conflicts with this Court's 1999 decision confirming the use of a "facial" analysis in challenges involving the criminal application of unconstitutionally vague laws. (*See Morales v. City of Chicago*, 527 U.S. 41).

The Court's opinions in *Morales* have not definitively set the standard of review in cases wherein there are no allegations of First Amendment free speech violations. Instead, courts across the Nation are applying pre-*Morales* precedent which prohibits any facial challenge if the challenger falls generally within the scope of the challenged law. In effect, courts are applying the rule as enunciated in *United States v. Salerno*, 481 U.S. 739 (1987): a "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (*Ibid.* at 745.) In *City of Chicago v. Morales*, *supra*, the Court failed to apply this standard in the area of criminal enforcement of vague and standardless laws. Because a substantial number of courts across the Nation are still applying the *Salerno* standard in deciding vagueness challenges and because other courts are either ignoring the *Morales* decision or following the dissenting opinions therein, it is respectfully submitted that the Court should grant Certiorari in order to clarify the appropriate standard of review.

Here, the Court of Appeals applied pre-*Morales* standards, citing to its longstanding rule that where actions are "plainly within the ambit of the statute, the court will not strain to imagine marginal situations in which the application of the statute is not so clear". (*See Ulster*'s citation to *People v. Nelson*, 69 N.Y.2d 302, 308, 514 N.Y.S.2d 197, 199, 506 N.E.2d 907; citing to *United States v. Mazurie*, 419 U.S. 544, 550; *United States v. Raines*, 362 U.S. 17, 20-22; *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611).

Each of the Supreme Court cases cited by the Court of Appeals under *Nelson* deals with situations where the great majority of acts would normally be interpreted as falling "squarely within the 'hard core' of the statute's proscriptions". (*See Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).) In such matters, this Court has long noted that when a prosecutor runs astray "it will be time enough to consider it when raised by some one whom it concerns." (*United States v. Wurzbach*, 280 U.S. 396, 399 (1930)). In Ulster's case, there is no lack of standing since criminal enforcement was not only imminent but the Attorney General proceeded in contempt of court. Such circumstances represent an exception to the general rules of standing as enunciated in *Broadrick*, *supra*. (*See Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 at 33-34 (1999)) ("facial" challenges may be permitted and challengers may "rely on the effect of the statute on parties not before the Court" where "threat of prosecution . . . hangs over their heads".)

The original rule began with Justice Holmes' opinion in *United States v. Wurzbach*, *supra*, as a common sense rule which estopped criminal defendants from challenging laws which were valid in the great majority of their applications. This rule has now been used a test for facial invalidity which requires the reverse, i.e., that the law be invalid in *all of its applications*. If *Salerno*'s "any set of facts" test continues to be used to summarily dispose of the great majority of vagueness challenges, such will rival the lowest level of scrutiny allowed

by this Court under Equal Protection case law wherein "the burden is upon the challenging party to negative **any reasonably conceivable state of facts** that could provide a **rational basis** for the classification." (*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (internal quotations omitted).)

A. *Morales* and *Salerno* represent conflicting lines of authority on the standard of review for "facial" challenges to criminal laws, producing conflicts among and between Federal and State Courts.

This Court's decision in *Morales* significantly affected the standard of review in cases dealing with vagueness challenges by focusing on the extent to which laws are guided by administrative enforcement standards. First, three members of the Court noted that the *Salerno* standard was not the Court's uniform standard for facial challenges and that when "vagueness permeates the text . . . it is subject to facial attack." (*Morales*, 527 U.S. at 55 (opinion of Stevens, J., joined by Souter, J. and Ginsberg, J.)) Second, two members of the Court concurred in the judgment on the basis that the ordinance at issue failed to include "sufficient minimal standards to guide law enforcement officers." (*Morales*, 527 U.S. at 65-66 (concurring opinion of O'Connor, J., joined by Breyer, J.)) Third, the concurring opinion of Justice Breyer noted that where a law lacks enforcement standards, "every application of the ordinance represents an exercise of unlimited discretion" and "the ordinance is invalid in all its applications". The opinion further noted that if a challenged law violates due process "on its face . . . , specification of details of the offense intended to be charged would not serve to validate it". (*Morales*, 527 U.S. at 71, quoting from *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

The conflict between the plurality in *Morales* and the plurality of Justices who believe that *Salerno* must be uniformly applied, reveals that there are two competing lines of authority under this Court's decisions to date. The *Morales* line of cases considered a number of factors in determining whether "facial"

review is appropriate. In the context of vagueness, "where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 and n.8 (1983). This factor alone has led the Supreme Court to "invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Id.*; *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Winters v. New York*, 333 U.S. 507, 515 (1948).

Second, as the Court held in *Kolender*, a statute may be "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." 461 U.S. at 358 n.8. The Supreme Court reaffirmed this principle in *City of Chicago v. Morales*, 527 U.S. 41 (1999). A six-member majority held that a loitering ordinance was unconstitutional on its face because it vested too much discretion in police officers enforcing it. While the case produced various opinions from the justices, on this point six justices decried the absence of "guidelines" in the ordinance, and ruled without regard to the facts as applied. *See id.* at 60-63; *see also id.* at 71. Such standards are, as the Appellate Division in *Ulster* noted, absent here as well, and accordingly call for a facial treatment.

As such, in criminal cases and those where undue discretion is allowed with respect to enforcement, this Court has permitted facial review without requiring a showing of vagueness in every application. As noted, in *Morales*, for example, to the dissent's complaint that the Court had transgressed the "every conceivable application" principle, commonly associated with *United States v. Salerno*, 481 U.S. 739, 745 (1987) (which even the dissent acknowledged to be exception-ridden, *see id.* at 76-83), it was explained that such expressions were dictum "which has never been the decisive factor in any decision of this Court," and that a constitutional violation is present where vagueness "permeates" the law in question. *Id.* at 55 n.3 (Opinion of Stevens, joined by Souter and Ginsberg).

Despite the holding in *Morales*, many courts are applying *Salerno* as a near jurisdictional prerequisite to all facial attacks in non First Amendment cases. Many cases even cite to the dissent in *Morales* in applying the *Salerno* standard. These issues were the subject of various opinions in 1996 when this Court rejected the opportunity to clarify the standard in an abortion related case. Justice Stevens commented that *Salerno* "summarized a long established principle of our jurisprudence" by stating that a law's potential invalidity under some conceivable set of circumstances is insufficient to render it wholly invalid. However, Justice Stevens further noted that "[u]nfortunately, . . . the *Salerno* opinion went well beyond that principle". (*See Janklow v. Planned Parenthood, Sioux Falls*, 517 U.S. 1174 (Memorandum of Stevens, J., on denial of Certiorari).) Yet, this concept was at the heart of the New York Court of Appeals' rulings herein. Although the Appellate Division specifically applied the *Morales* standard, the Court of Appeals reversed noting that those who clearly fall within a law's scope may never argue that it may be unconstitutionally applied to others.

This Court is decidedly fractured on the two competing levels of Constitutional review. The dissent in *Janklow*, noted that the question of *Salerno*'s applicability was a "question that virtually cries out for our review." (*Janklow*, 517 U.S. 1174 at 1178 , Scalia, J., dissenting on denial of certiorari.) Although *Janklow* was an abortion related case, the dissenters noted that "the courts of appeals regularly enforce that supposed dead letter (referencing *Salerno*'s application outside of abortion context), often in cases in which its 'draconian' character prevents the facial challenge from succeeding". (*Id.*) As such, this was "all the more reason to grant certiorari and make that clear." (*Id.*) Clearly, the dissenters viewed *Salerno*'s continued application in non-Abortion cases to be worthy of review if the *Salerno* principle was indeed a "dead letter".

B. Conflicts among the State and Federal Courts.

State and Federal court decisions in this area have also split over whether the correct standard of review should be the *Salerno* line of authority precluding judicial review of all but a very few "facial" attacks or the views set forth in *Morales*. The fact that this Court is so fractured has contributed to the failure of many courts to even recognize an alternative to *Salerno*. Nevertheless, in a number of recent cases, State courts have begun to disavow the *Salerno* formulation. (*See Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 748 N.E.2d 1111, (2001) (Majority "ignores" *Salerno* standard and facially invalidates statute dealing with workers compensation waivers); *Robinson v. City of Seattle*, 102 Wash. App. 795, 10 P.3d 452 (2000) (Noting that the "*Salerno* test" has not been followed by the Supreme Court).

Other State court decisions have explicitly rejected *Salerno* as constitutionally mandated in the review of vagueness challenges. (*See Rodriguez v. State*, 2001 WL 395399, Tex. App.-Houston [14 Dist.] (2001).) In *Rodriguez* a Texas appeals court held that the term "immediately" is overly vague and standardless, noting:

> There are serious conflicts in the opinions of the Court of Criminal Appeals and the United States Supreme Court as to whether a defendant is required to show a penal sanction is unconstitutionally applied as to him or in all of its possible applications before a successful **facial** challenge can be made.

In *People v. Maness*, 191 Ill. 2d 478, 247 Ill. Dec. 490, 732 N.E.2d 545 (2000), the Illinois high court invalidated the "wrongs to children act" where the statute did not set forth standards to regulate what constitute "reasonable steps" and no guidelines existed for authorities to follow in evaluating what "reasonable steps" are from case to case. The court noted: "This is certainly not a decision that should be left to the 'personal predilections' of the governmental authorities who must apply section 5.1." (*Id.*, 191 Ill. 2d at 485)

More disturbing are the State court decisions which have followed *Salerno* as a threshold requirement for facial review. The Court of Appeals in New York falls under this line of authority since it has consistently and summarily precluded facial attacks noting that one whose conduct falls within the scope of the challenged law may not assert that it is vague as applied to others. As noted above, the Court of Appeals applied pre-*Morales* Federal Constitutional case law in rejecting such a challenge.

The Federal Circuit Courts of Appeal have also produced decisions which are split on whether *Salerno* bars the facial review of all challenges in non-First Amendment cases. For example, in the area of abortion related laws, the majority of cases have found the *Salerno* rule to be discredited. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (noting that the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), may have changed the standard allowing a facial review if law affecting fundamental rights is invalid "in a large fraction of cases").

Other courts have refused to extend the holdings of the abortion line of facial challenges to non-First Amendment, non-abortion cases. In *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461 (9th Cir. 2001), the Ninth Circuit noted that three Supreme Court Justices have stated in dicta, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation" and that "another plurality of Justices is equally adamant that *Salerno* is the correct standard in every context, with the exception of certain First Amendment cases. (Thomas, J., dissenting, joined by two Justices)"; The Ninth Circuit then reasoned:

> While we have held that *Casey* "overruled *Salerno* in the context of facial challenges to abortion statutes," *Lawall, 180 F.3d at 1027*, "**we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.**" See *Rodriguez de Quijas v. Shearson/American*

> *Express, Inc., 490 U.S. 477*, 484, (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

In conflict with the reasoning of *Myers* is *Staley v. Jones*, 239 F.3d 769 (6th Cir. 2001). This case involved an individual convicted under Michigan's anti-stalking statute. The Court held that *Morales* changed the law, noting that the "debate between Justice Scalia and the plurality in *Morales* reveals, there was no '*clearly* established federal law' as determined by the Supreme Court in 1996 as to the proposition that a facial attack outside the First Amendment context did not also consider the defendant's conduct". (*Id.* at 790.) The Sixth Circuit noted that its own precedent was inconsistent, citing to *Belle Maer Harbor v. Charter of Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) ("even in cases not involving First Amendment rights, we have recognized that courts may engage in a facial analysis where the enactment imposes criminal sanctions.") (*Staley*, 239 F.3d at 790 n.26).

Similarly, other Federal Courts have expressly identified the schism in the Supreme Court's decisions. (*Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2d Cir. 2000)) ("It is not even clear that *Salerno's* 'no set of circumstances' test articulates an exclusive standard for making facial challenges *outside* the First Amendment context", citing to *Morales*); *United States v. Kafka*, 222 F.3d 1129 (9th Cir. 2000) (Noting that the plurality in *Morales* was "criticizing *Salerno* and suggesting that a plaintiff can prevail on a facial challenge by merely showing a statute is unconstitutional in most cases"); *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("Three Supreme Court Justices have recently questioned *Salerno's* 'no set of circumstances' formulation of the facial challenge standard and suggested that a plaintiff can prevail on

a facial challenge by merely showing the Act is unconstitutional in most cases"); *United States v. Frandsen*, 212 F.3d 1231, 1236 n.3 (11th Cir. 2000) (collecting authorities); *Planned Parenthood v. Farmer*, 220 F.3d 127, 142 (3d Cir. 2000) (collecting cases). *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1322 (2000) (describing recent scholarly agreement on this point); *see also* Michael C. Steel, *Constitutional Law – The Vagueness Doctrine: Two Part Test, or Two Conflicting Tests?*, 35 Land & Water L. Rev. 255, 271 (2000).

Other Courts have simply ignored *Morales* and continue to apply the *Salerno* standard. In fact, some cases cite to the dissent in *Morales* and apply the *Salerno* rule. *West v. Derby Unified School District*, 206 F.3d 1358 (2000) ("we believe cases of alleged unconstitutional enforcement of a public school district's disciplinary policies, like any other laws, are best addressed in most instances 'when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge.' ") (*Ibid.* citing to *Morales*, 527 U.S. 41, Thomas, J. dissenting.) *See also Smith v. Greene County School District*, 100 F. Supp. 2d 1354 (2000) (reasoned that since "Justice Stevens declined to resolve the continuing viability of the *Salerno* doctrine" in the *Morales* case, it should follow Justice Scalia's dissenting opinion.)

In one recent case, the First Circuit applied *Salerno*'s test to foreclose a challenge to legislation enacted in the State of Maine, designed to pass along discounted prices to the uninsured.[4] (*Pharmaceutical Research and Mfrs. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001). The concurring opinion noted that many Courts across the Nation are still applying *Salerno* in

4. Coincidentally, Maine's statute seeking to benefit the uninsured is the exact opposite of the policy interpretation made by the Attorney General herein, i.e., that the uninsured are the only class of patients deemed to be the "general public". The Attorney General's interpretation of "charges to the general public" precludes Ulster from providing discounts to the uninsured for fear of the Attorney General's insistence that the Medicaid cost-based rate be replaced with such "charges to the general public".

a dispositive manner: "It is true that the *Salerno* decision has been criticized in later opinions of some Justices of the Supreme Court. *** *Salerno*, nevertheless, continues to be cited by both the Supreme Court and the Courts of Appeals." (*Concannon*, 249 F.3d at 94-95.) The Circuit Court in *Concannon* refused to extend *Morales* to such facial attacks, reasoning that "[i]f such an extension of the jurisprudence of **facial** challenges expressed in decisions of the Supreme Court of the United States is to occur, it is more appropriate that it occur in an opinion of that Court than in an opinion of a Court of Appeals." (*Concannon*, *supra*, at 95.)

In contrast, cases such as *Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000) (invalidating an Arizona statute which criminalized medical experimentation on vagueness grounds), apply *Morales* in a straightforward fashion without any reference to *Salerno*. Here, the Ninth Circuit applied a heightened level of review as appropriate in criminal cases, noting that

> a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . But where a statute criminalizes conduct, the law may not be impermissibly vague in any of its applications.

Forbes, 236 F.3d at 1012 citing to *Kolender*, 461 U.S. at 357. The court later corrected this last statement, rephrasing its view that "where a statute criminalizes conduct, the law may be invalidated on vagueness grounds even if it could conceivably have some valid application." (*Forbes*, *supra*, as modified at 247 F.3d 903). The Appellate Division's decision which was reversed by the Court of Appeals herein is another example of a straightforward application of *Morales*.

The conflicting decisions described above sit on either side of a clear fault line which has developed in the Supreme Court's precedents. As Justice Scalia noted in *Janklow*, *supra*, it is cases

such as Petitioners' herein which cry out for resolution. Particularly since the Appellate Division clearly applied *Morales* and the Court of Appeals ignored it. As such, the case herein cries out for review and reversal.

In this context, the danger of allowing this Court's *Morales* standard to be ignored is that innocent people will be subjected to criminal prosecutions without any available Court review until after their rights have been trammeled. Moreover, allowing criminal prosecutions where no standards exist forces individuals to waive their rights and plead guilty to offenses to avoid the extensive penal terms sought by a prosecutor in such cases.

C. This Joint Petition presents compelling grounds for addressing the conflicts in State and Federal Courts regarding the standard for "facial" challenges.

There are three factors which make this Joint Petition ideal for resolving the conflicts between the Court's decision in *Morales* and the *Salerno* standard. First, there are no First Amendment issues involved herein. As such, this Petition pointedly raises the appropriate standard of review for non-First Amendment rights. Second, the Joint Petition represents extremes as to the potential applicability of the challenged law. In *Ulster*, the Petitioner had obtained full declaratory relief without a trial or discovery simply on the face of the "public charge" regulation in the context of Ulster's admitted facts. In *Rubin*, the Petitioner was indicted and convicted after a full jury trial.

Lastly, the high court failed to provide any limiting construction as to the "public charge". In effect, the high court leaves it for juries to decide on a case by case basis, whether a provider believed that "general public" was restricted to "private" paying patients only and what level of "charge" could form the basis of a violation. In another case, a prosecutor will be free to charge a provider with failing to bill Medicaid at the lowest "charge" to any single member of the "general public", even though the provider may collect higher amounts from

certain patients who may provide payment at a "list" price. The prosecutor is also free to modify the term "general public" on a case-by-case basis, or he may substitute some other passive regulation as a violation given the certification of compliance with all "applicable" regulations.

Nothing will guide the prosecutor or the jury in developing such standards other than the Attorney General's own thoughts of what sound Medicaid policy should be. "[A] criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than the inexorable command of relevant language". (*M. Kraus & Brothers., Inc. v. United States*, 327 U.S. 614, 626 (1946).) Without objective standards, there are a multitude of ways in which the public charge regulation may be interpreted. Given this range, the result of the high court's decision will be to allow policy issues to be resolved by various juries on a case-by-case basis. As noted by Justice Brewer, siting as circuit judge: "The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." *Tozer v. United States*, 52 F. 917 (D.C. Mo. 1892). Justice Brewer references the law of the Chinese Penal Code, which reads: " 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' " He then concludes that there is very little difference between such a statute and one which would make it a criminal offense "to charge more than a reasonable rate". (*Id.* at 920.)

The failure to provide any limiting construction is a critical violation of due process in and of itself. It is crucial in a regulatory context that the Supreme Court clarify the standards to be applied where laws are challenged under the second prong of the vagueness test. In many cases, words dealing with common and ordinary terms (e.g., importuning, or jostling, or stalking, or affiliated, etc.) may be resolved by the common understanding these terms have developed in our culture. In these cases, the great majority of those brought into the

criminal justice system may likely fall within the rules. And the juries in such cases may be properly instructed thereon. The instances will be rare where prosecutors will expand upon the traditional focus of such crimes. However, this is not the case where prosecutors are free to utilize blanket certifications of compliance and mine thousands of regulations as the basis for alleging false certifications. The potential for abuse by specialized prosecutors in this area, zealous in their pursuit of restitution and prison sentences, is self-evident.

Unlike words of common usage, where words are used as part of a complicated regulatory program, where it is the standard to define ad nauseam rather than to leave vague, and where the meanings of terms are laced with government policy implications, it is essential that the regulatory agency define the terms of art to be used before criminal enforcement is sought. Otherwise, a prosecutor may arrive at his or her own technical interpretation and apply such interpretation retroactively to place unsuspecting parties in jail.

The technical interpretation at issue herein is an extreme example of this point. The Attorney General asserts that a totally passive regulation affirmatively required that home care providers conform their billing practices to the "public charge" concept. He then defines "general public" to mean only "private" uninsured patients. This interpretation is diametrically opposed to the dictionary meaning of "general public". Additionally, the Attorney General's interpretation of "charges" is one out of 10 distinct ways in which this term could be reasonably interpreted.[5]

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5. Medicare regulations have yet to define "actual charge". A regulatory proposal on this definition notes: "There is no definition of 'actual charge' in the Medicare statute, and some would argue that 'actual charge' means whatever amount the physician, supplier, or other person who furnishes the service states it is, regardless of whether he, she, or it charges the beneficiary or the beneficiary's private plan that amount or makes any effort to collect it. In fact, because of the prevalence of participation in private plans, the physician, supplier, or

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The Appellate Division in this case explored the potential of developing such a limiting construction, but had to reject it since there was no legislative intent to support the Attorney General's construction. In this respect, as noted by the Supreme Court, not even the Courts should set about defining otherwise vague laws when important policy issues have been left unresolved:

> As this Court long ago explained, "it would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." (See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 845 FN 49 (1997), quoting from *United States v. Reese*, 92 U.S. 214, (1875).)

Five judges of New York's intermediate appeals court found the law to be impossibly vague and standardless. Five judges of the State's high court summarily reversed, finding the law to be clear to the ordinary health care provider. Rather than adopting a limiting construction, the high court left it to the juries to decide each provider's fate. Incredibly, in the Rubin case, the jury was given no instruction on the definition of "general public" or "charges". Instead, the only directions given to the jury was whether they believed that the defendant thought that he was violating the regulation. This was proven not by admissions but by the after the fact testimony of disgruntled former employees.

Given this context, Petitioners strongly believe that this case provides the best context to both correct insidious violations

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other person might never charge or expect to collect this amount from anyone." (*See* 62 FR 33158, Proposed Fee Code Changes for 1998, at R-292).

of due process caused by enforcement of standardless regulations and clarify the standard of review to be applied in vagueness challenges outside of the First Amendment context.

II.

THE DECISION BELOW MISAPPLIED SUPREME COURT PRECEDENT TO PRECLUDE REVIEW OF VAGUE REGULATIONS.

As a "separate basis", the Court of Appeal's decision in *Ulster*, held that the underlying regulations, being only an element in the crime of falsely certifying compliance with "applicable" regulations, may not even be tested for vagueness. The Court of Appeals relied on this Court's decision on a McCarthy era law which affirmed a prosecution for lying about membership in the Communist party. (*Bryson v. United States*, 369 U.S. 64 (1969).) This represents a gross misapplication of *Bryson* and necessarily leaves the decision as to a regulation's clarity to the trier of fact — the jury. Based on the preclusive effects that the New York decision will have on the ability of all health care providers to challenge regulations on vagueness grounds, it is respectfully submitted that review is appropriate to avoid substantial injustice for all those who will now be subject to this preclusive ruling.

This Court has followed *Bryson* for the proposition that one who lies in response to governmental questions may not avoid the consequences of such lies by claiming that the government had no basis upon which to ask the questions. (*See United States v. Mandujano*, 425 U.S. 564, 577 (1976)). However, this Court has never applied *Bryson* as a bar to judicial review of certifications which incorporate by reference vague legal provisions. The result of such a preclusion in this case will allow juries to decide legal issues as to whether a provider falsely certified compliance with all "applicable regulations". Trial courts in New York will be precluded from examining the underlying regulations to determine whether they are "applicable" or even to determine whether they were ever enforced by the agency.

The breadth of power given to prosecutors by this ruling is frightening. These circumstances violate not only the basic principles underlying the due process clause of the Fourteenth Amendment, but conflicts with the essential checks and balances of democracy identified as first essentials since the time of Aristotle.[6]

Health care providers face the threat of criminal prosecution with each and every claim that they submit for payment noting that they have complied with "all applicable regulations". If the New York Court's application of *Bryson* insulates all such "regulations" from constitutional attack by either declaratory action or even within the criminal trial, we have taken a step back into the star chambers of the Fourteenth and Fifteenth centuries. For example, in this case the Attorney General's allegation concerned a regulation which neither prescribed nor proscribed any conduct whatsoever. The "public charge" regulation is entirely passive and several courts in other States have declined to allow prosecution of false claims thereon, interpreting identical language as not requiring that a provider do anything at all. In *People v. Duz-Mor Diagnostic Laboratory, Inc.*, 68 Cal. App. 4th 654, 80 Cal. Rptr. 2d 419 (1999), the California Court of Appeal rejected a false claims action brought by California's Attorney General relating to the provision of

6. As noted in a popular historical text:

> By the end of the fourth century it had come to be necessary to emphasize that "in a democracy the laws should be masters". Against this background certain famous passages in Aristotle, . . . appear as a vindication of that traditional ideal. *** "*It is of great moment that well drawn laws should themselves define all the points they possibly can, and leave as few as possible to the decision of the judges [for] the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them.*"

(From Origin of the Rule of Law, Friedrich A. Hayek, *The Constitution of Liberty*, University of Chicago Press, 1960 pp. 162-175).

discounts to "private" pay patients. The court noted that the Attorney General found "the practice is unfair to the public because Medi-Cal is not offered similar discounts". However, the passive nature of the regulations precluded any assertion of false claims. As held by the court, "[u]nder those regulations, Medi-Cal will pay no more than the lesser of the amount billed, the charge to the general public, Medicare's allowance, or scheduled amounts. . . ." *Medi-Cal, not Duz-Mor, controls the amount Medi-Cal pays.* (*See also United States of America v. Bruno's, Inc., et al.*, 54 F. Supp. 2d 1252 (M.D. Ala. 1999)) (It is "the Alabama Medicaid Agency itself, and not the Defendants, that sets the amount of the dispensing fee. . . . Defendants merely charge the fee Medicaid tells them to charge".)

Apart from whether it even reaches the public charge regulation, the scope of the "laws and regulations" embraced by the form certification applies to all "applicable federal and state laws and regulations." Unlike a certification of a particular fact, where the person can focus on the accuracy of that fact, this certification requires a layperson to make sweeping, multifaceted legal judgments of infinite scope. Such a process undermines the notice principle of due process and invites arbitrary prosecutorial behavior. The theory exposes those who do business in regulated industries to criminal prosecution on the basis of a multitude of regulations, many no doubt poorly-drafted and never conceived as defining criminal behavior.[7]

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7. The New York health care regulations occupy hundreds of pages and typically consist of complex, multi-part regulations like the public charge regulation here. By way of illustration, 18 NYCRR § 505.14, of which the public charge regulation is one small part, occupies some 38 pages in the official volume of regulations. 18 NYCRR Part 505 in total occupies 161 pages. 10 NYCRR Part 86, relating to rates for medical facilities, is 406 pages. 10 NYCRR Part 405, relating to hospital standards is 111 pages, and 10 NYCRR Part 415, relating to nursing home standards, is 68 pages. These are just some of the state's regulations. Federal regulations are equally prolific.

Subsequent decisions of this Court have clearly allowed for judicial review of ambiguous questions in prosecutions for perjury and false statements. Courts have recognized that citizens have an important interest in participating in government functions without fear of prosecution over ambiguous demands for information. One reason that perjury may not be premised on ambiguous questions is to encourage citizens to participate in the judicial system. *Bronston v. United States*, 409 U.S. 352, 359 (1973). The same policy applies to individuals who must submit forms to participate in government programs. *See United States v. Manapat*, 928 F.2d 1097, 1100 (11th Cir. 1991) ("Members of our society are often asked to fill out standardized forms containing large numbers of general background questions. . . . unwary citizens should be able to expect that important questions will not be hidden in laundry lists of unrelated topics."); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987) (encouraging participation in banking system).

Citizens who are at risk of prosecution based on broad statements of regulatory compliance should have the right to obtain injunctive relief and judicial review under such circumstances. This Court's decision in the case of *Cramp v. Board of Public Instruction*, 368 U.S. 285 (1961), is applicable to *Ulster*'s position in this respect. This Court held that a teacher had standing to bring a suit contesting a vague loyalty oath because "the very vice of which he complains is that the language of the oath is so vague and indefinite that others could with reason interpret it differently". (*Cramp*, 368 U.S. at 284.) Similarly, *Ulster* (as well as any other similarly situated provider) should have the ability to contest a regulation whose terms were too vague to be used in a criminal context. *See Goland v. United States*, 903 F.2d 1247, 1253 (9th Cir. 1900) (*Bryson* does not insulate review of focus of charges.).

Participation in any aspect of government regulated areas — whether it be as a provider in a health care program or as a driver of a car — may be conditioned on certifying that one is

in compliance with "all applicable" laws or that one has "done no wrong". This creates an extremely broad net for enforcement purposes. Precluding review of the underlying regulation ensures that a defendant is at the complete mercy of the prosecution's unilateral interpretation thereof. No other court has given this much discretion to a state-wide prosecutor.

Under the New York high court's decisions, a prosecutor may disclaim that he or she is enforcing a particular regulation and instead argue that he is enforcing the false claims and larceny laws for lying about compliance with all "applicable" regulations. Yet the policy issue behind such enforcement remains the Attorney General's belief that discounts given to the uninsured should have been passed along to Medicaid. This creates an even more significant threat. As Justice Breyer noted in his concurring opinion in *Morales*, a law which makes it a crime to do wrong is vague in all of its applications because a prosecutor has unlimited discretion in every case. Similarly, being prosecuted for certifying that one has "committed no wrongs" is just as unconstitutionally vague in all of its applications.

III.

THE COURT'S RULING VIOLATES THE TRADITIONAL PRECEDENTS OF THIS COURT ON THE MERITS OF THE VAGUENESS CHALLENGE.

Where a State court's decision is "flatly contrary to this Court's controlling precedent", certiorari is appropriate. Accordingly, the refusal of New York's Court of Appeals to follow *Morales*, *supra*, as well as the Court of Appeals' refusal to apply *Connally*, *infra*, provide substantial reasons for granting Certiorari. (*See Arkansas v. Sullivan*, __ U.S. __, 121 S. Ct. 1876, 1878 (2001).

The law at issue in *Ulster* and *Rubin* is extraordinarily similar to the rule invalidated by this Court in *Connally v. General Construction Co.*, 269 U.S. 385 (1926). *Connally* has been cited favorably for the past 75 years by both Federal and State appellate courts. The Appellate Division heavily relied

upon *Connally* in its decision before reversal. Since *Connally* is controlling precedent as to the vagueness of undefined terms similar to "charges" and "general public", reversal would be mandated to restore the Appellate Division's application of *Connally* and *Morales* as the basis for invalidation of the "public charge" regulation.

In *Connally*, the Supreme Court analyzed whether the words of the statute could be properly applied given the varied definitions and varying rates paid by the contractor. The Court held that

> this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., . . . The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them." The Court held that "to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer.

Connally, 269 U.S. at 393, emphasis supplied.

Similarly, Ulster's actual prices even after discounts ranged from amounts below the Medicaid cost-based rate to amounts well above this rate. The Appellate Division herein was virtually bound to apply *Connally* under the circumstances where the only words used in the regulation was to pay the "lower" of either the rate "charged" to the "general public" or the cost-based rate. *Connally* held that

> [t]o construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to

> determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the Legislature as to promote it.

Ibid.

The Court then noted that the qualifying term "locality" was just as amenable to varying interpretations: "Who can say with any degree of accuracy, what areas constitute the locality where a given piece of work is being done?" Similarly, the qualifying term "general public" can mean anything a jury or prosecutor wishes it to mean.

The facts in *Ulster* and *Rubin* are even more compelling in that no one could predict that the "public charge" regulation would even be used administratively, let alone criminally, since it was so devoid of meaning given the extensive cost-based methods used to set reimbursement levels. When criminal enforcement transgresses into a heavily regulated field, the prosecution must be certain of the pre-existing policy in question. (*See Upton v. Securities and Exchange Commission*, 75 F.3d 92, 98 (2d Cir 1996) ("Because there was substantial uncertainty in the Commission's interpretation of Rule 15c3-3(e), Upton was not on reasonable notice that FiCS's conduct might violate the rule")

Fourteen years in prison is a heavy price to pay for failing to interpret a vague regulation which lacked an enforcement precedent, in conformity with the prosecutorial arm.

CONCLUSION

For the foregoing reasons, petitioners respectfully requests that the petition be granted.

Respectfully submitted,

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